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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

UNITED REVENUE SERVICE, INC., et  
al.,

Defendants and Appellants,

v.

DENISE PRALL,

Plaintiff and Respondent.

G032279

(Super. Ct. No. 02CC04214)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Dennis S.  
Choate, Judge. Affirmed.

Payne & Fears, Karen O. Frankudakis and Andrew J. Jaramillo, for  
Defendants and Appellants.

Carroll & Werner and David B. Carroll, for Plaintiff and Respondent.

United Revenue Service, Inc., United Concepts, Inc., United Professional Services, Inc., United Consultants, D&N Financial Services Company, Black Rose, Red Rose and David Kalai (collectively United Revenue) appeal from a trial court order denying their motion to compel arbitration of the complaint filed by Denise Prall. United Revenue contends Prall agreed to arbitration in writing on three distinct occasions, and that any one of those arbitration provisions would constitute an appropriate basis to compel arbitration. We disagree. The first arbitration provision was included in an employment agreement that was superceded by the agreement containing the second provision, and the third provision was found by the trial court to be unenforceable based upon disputed evidence. We cannot disturb the court's factual conclusions when they are supported by substantial evidence. Consequently, the only arbitration provision which might provide a basis to compel arbitration is the one contained in the employment agreement entered into between Prall and United Revenue Service, Inc., in 2000. As to that agreement, we agree with the trial court's determination of unconscionability and its refusal to sever the offending provisions. We therefore affirm the order denying the motion to compel arbitration.

\* \* \*

Prall was employed by United Revenue Service, Inc., for several years.<sup>1</sup> In 1998, she was required to sign an employment agreement that contained a provision requiring arbitration of any employment-related disputes. In 2000, she was required to sign another employment agreement, which specifically renounced any prior promises or obligations, and also included its own arbitration provision. Prall testified that she did

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<sup>1</sup> It is unclear why Prall named an entire infield full of entities, in addition to her employer, United Revenue Service, Inc., as defendants in her complaint. Those defendants suggest she may have done so in an attempt to avoid application of the arbitration provision which, by its terms, governs only her claims against United Revenue Service, Inc. She contends the entities are all alter egos of one another. The issue is not relevant to our analysis, and we do not consider it.

not want to enter into any employment agreement containing an arbitration clause, but that Kalai told her that “if I did not, he would withhold my paycheck until I did.”

The arbitration provision contained in the 2000 employment agreement stated, among other things, that “[t]he administrative costs of the Arbitration proceedings shall initially be borne by the party requesting the Arbitration. The prevailing party to such Arbitration proceedings, should there be a prevailing party, shall be entitled to recover from the other all reasonable attorney’s fees and costs incurred by said prevailing party in connection with the Arbitration proceedings.” It also stated that the parties “agree they . . . are significantly limited in the amount of discovery of information they may obtain from the other side should a dispute arise.” The arbitration provision also had a choice of law and venue clause, stating: “This agreement is governed by the laws of the State of Nevada. The Employer at its discretion may choose a venue or jurisdiction in any other place within or without the United State [*sic*] of America as will accept the venue or jurisdiction. Employee expressly agrees any suit Employee may file shall be filed in the state of Nevada.”

In February of 2001, Prall took a leave from her employment because of a medical condition. She did not specify a return date. In May of 2001, Prall notified United Revenue System, Inc., she would not be returning to her employment. In September of 2001, Prall filed a lawsuit against United Revenue, alleging her decision to leave her employment was the product of a sustained campaign of sexual harassment perpetrated against her by David Kalai, and that her employment termination had amounted to constructive termination in violation of public policy.

After Prall filed her complaint, United Revenue’s counsel made several requests that she pursue her claim in arbitration, in accordance with the provision of her employment agreement. Prall’s counsel repeatedly refused those requests, pointing out the arbitration agreement was unduly burdensome and unenforceable. Ultimately, in January of 2002, the attorneys entered into a letter agreement providing that Prall would

dismiss her lawsuit without prejudice and pursue her claims in arbitration before the American Arbitration Association (AAA). Each party would be allowed a specific amount of discovery, and the arbitration would be governed by California law. The letter also stated the expense of the arbitration would initially be borne by United Revenue Service, Inc., but would ultimately be borne by whichever party lost.

In February of 2002, Prall dismissed her lawsuit without prejudice. However, the parties could not thereafter agree on the mechanics of initiating the arbitration. Apparently Prall's attorney understood he would file her demand for arbitration as soon as United Revenue provided the initial fee payment, and serve defendants with a copy of the demand in the normal course of filing. United Revenue's counsel refused to advance the fee until *after* it had received a copy of the demand.

That game of I'll-show-you-mine-if-you-show-me-yours ended after Prall re-filed her superior court case in March of 2002. Prall's attorney took the position that United Revenue had waived whatever rights it might have had under the January letter agreement, when it failed to advance the arbitration fee as required in that agreement.

For its part, United Revenue contended it had not breached its obligation to pay fees under the letter agreement, because it was unable to properly prepare the check until after Prall had presented it with a copy of her demand for arbitration. As United Revenue's counsel explained orally to the trial court, "on March 27th, we said we're willing to deposit the fees to the A.A.A., but we need to see the demand for arbitration first. The A.A.A. has a fee schedule. The fees are dependent upon the amount demanded. So without seeing that demand, we had no choice, we had to keep litigating this."

However, the correspondence submitted by United Revenue in support of its contention seemingly contradicts counsel's explanation. On both March 27 and March 28, 2002, United Revenue's counsel informed Prall's counsel that it actually *had* the check ready to deliver, but was simply refusing to do so without first receiving a copy

of the demand. Specifically, the letter of March 28 stated, “we have prepared a check for advance payment . . . and will submit it to you immediately upon receipt of the demand for arbitration.” Thus, contrary to counsel’s explanation to the trial court, it was apparently unnecessary to *see* the demand in order to ascertain the proper amount of the fee.<sup>2</sup>

The case was ordered into non-binding judicial arbitration in fairly short order. During that arbitration, United Revenue defended on the merits, but also contended the case should be referred to binding contractual arbitration. The arbitrator recommended the case “should” go to arbitration, and Prall requested a trial de novo.

United Revenue then filed a motion for summary judgment, arguing it was entitled to judgment as a matter of law because the case was subject to mandatory arbitration. Prall opposed the motion, arguing the arbitration provision contained in the 2000 employment agreement was unconscionable and unenforceable pursuant to *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, and that whatever rights United Revenue might have had under the January 2002 letter agreement had been forfeited when it refused to tender payment of the arbitration fee.

After initially expressing some consternation that United Revenue had elected to pursue summary judgment rather than a motion to compel arbitration, the trial court agreed with Prall on the merits. It concluded that the letter agreement was “not binding” on Prall, and that the arbitration provision in the employment agreement was “unconscionable.”

Apparently undeterred by the fact the court had already rejected its arguments on the merits, United Revenue waited only a week before filing a petition to

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<sup>2</sup> At oral argument before this court, United Revenue’s counsel attempted to explain why the correspondence informing Prall’s counsel that the check was actually available, were not inconsistent with the position taken by United Revenue in the trial court. She stated that the letters merely conveyed the fact that she personally had possession of blank checks from United Revenue, and would be able to fill in the appropriate amount on one immediately upon receipt of the demand. That explanation is not in evidence, however, and appears to contradict the express statement in the March 28 letter that the check had actually been “prepared.”

compel arbitration, based upon the same arguments that had failed to persuade the court so recently. Not surprisingly, they failed again, and the court denied the motion.

## I

United Revenue contends there are three distinct agreements to arbitrate, and seems to be suggesting that if any of those agreements complies with the requirements of *Armendariz*, then the court should have ordered the case into arbitration. We disagree. Although Prall entered into two different employment agreements with United Revenue Service, first in 1998, and subsequently in 2000, the latter agreement expressly provides that it embodies the entire agreement between the parties, and “no other prior verbal or written promises constitute a binding obligation to any party.” Thus, once the parties entered into the 2000 agreement, the 1998 agreement was of no effect, and United Revenue could not enforce it. In the absence of a wholesale rescission of the 2000 agreement, which no party has suggested, we can discern no basis upon which any portion of the 1998 agreement might be revived.

The third agreement offered up by United Revenue is based upon the post-dispute letter agreement executed by the parties’ attorneys in January of 2002. However, the parties presented the trial court with a factual dispute concerning whether United Revenue had complied in good faith with its own obligations under that agreement, and whether it had thus waived the right to enforce the agreement against Prall. That, of course, is one of the primary issues to be determined by the court on a petition or motion to compel arbitration. “[T]he existence of a valid agreement to arbitrate is determined by reference to state law principles regarding the formation, revocation and enforceability of contracts generally.” (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1327-1328.) Here, the evidence was sufficient to support the conclusion United Revenue had not complied in good faith, and the trial court expressly found, in connection with the summary judgment motion, that the letter agreement was “not binding on [Prall].” When the trial court resolves a dispute of fact based upon substantial

evidence, we cannot disturb its conclusion.<sup>3</sup> We thus turn to the issue of whether the arbitration provision contained in the 2000 employment agreement was unconscionable, and hence unenforceable against Prall.

## II

In *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th 83, our Supreme Court concluded that certain arbitration provisions imposed by employers on their employees were unconscionable, and thus unenforceable against an employee asserting employment discrimination.<sup>4</sup> The court explained those provisions would be ones suffering from “both a “procedural” and a “substantive” element” of unconscionability. (*Armendariz*, *supra*, 24 Cal.4th at p. 114, quoting *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473.)

Procedural unconscionability focuses on whether there is an inequality of bargaining power, i.e., whether the employee has any meaningful opportunity to negotiate the terms of the agreement. In this case, as in *Armendariz* itself, “[t]here is little dispute that [the agreement] was imposed on employees as a condition of employment and there was no opportunity to negotiate.” (*Armendariz*, *supra*, 24 Cal.4th at pp. 114-115.)

The arbitration provision at issue here was contained in a 14-page standardized “employment agreement” apparently presented to all employees of United Revenue Service, Inc. The agreement given to Prall was individualized only to the extent it identified her as the “employee” on the first page, and it included an exhibit detailing the specific requirements of the position she held. United Revenue offered no evidence to contradict Prall’s declaration stating she was given no opportunity to negotiate the

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<sup>3</sup> We need not reach the issue of whether the arbitration letter agreement executed solely by counsel would be enforceable in any event. (See *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396.)

<sup>4</sup> In *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076, the Supreme Court subsequently determined that the *Armendariz* analysis was equally applicable to an employee’s claim of wrongful termination in violation of public policy.

terms of the agreement, and that she was told *she would get no paycheck until she signed it.*<sup>5</sup>

Referring specifically to pre-employment arbitration provisions, the Supreme Court explained that “the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.” (*Armendariz, supra*, 24 Cal.4th at p. 115.) That pressure is, if anything, greater on an employee such as Prall, who is faced with the prospect of losing the job she already has. And when we add to that the fact Kalai threatened to withhold Prall’s paycheck until she signed the agreement, there can be no dispute about whether the circumstances of this case satisfy the procedural aspect of the unconscionability determination. They clearly do.

We conclude the arbitration provision here also qualifies as substantively unconscionable pursuant to *Armendariz*. “Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.” (*Little v. Auto Stiegler, Inc., supra*, 29 Cal.4th at p. 1071.) In this case, the arbitration provision contains a shockingly one-sided venue clause, expressly allowing United Revenue to file an action against Prall in any jurisdiction it may choose, while requiring her to file suit in *Nevada*. United Revenue, pointing to this court’s decision in *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, suggests that such a provision, while improper, can merely be stricken, and should not affect the enforceability of the remaining arbitration agreement.

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<sup>5</sup> United Revenue apparently concedes that Prall’s execution of the 200 Employment Agreement was a condition of maintaining her *future* employment. The company claimed Prall never expressly testified before the Unemployment Insurance Appeals Board that she was told she would also be denied “her already earned pay” if she did not sign the second Employment Agreement.” In our view, however, her testimony before the Board was consistent with the contention she made in her declaration filed with the trial court. When asked “Can you be specific about what caused you to believe today that you were under duress when you signed those agreements?” she answered, “Because I would not get my paycheck. David Kalai told me I would not be getting my paycheck nor would anyone else if those contracts were not signed.”

However, *Bolter* is distinguishable, because the arbitration venue clause in that case was at least mutual, purportedly binding all parties to bring their claims in Utah. The court simply determined that the clause, as applied, created a significant advantage for the large franchisor which imposed it, because it would unduly restrict the ability of California franchisees to pursue their claims. In this case, by contrast, United Revenue Service, Inc., did not even try to make the venue provision appear fair. Instead, it expressly reserved to itself the right to file actions wherever it pleased, while Prall was restricted to bringing her claims in a *neighboring* state.<sup>6</sup>

Additionally, in *Bolter* the one-sided venue clause was the sole problem with the agreement, while the same cannot be said here. This agreement is also objectionable because, in direct contravention of *Armendariz*, (decided three months previously) it expressly requires Prall to pay all forum costs of any arbitration she files, subject to reimbursement only if she prevails. United Revenue suggests that such a term is acceptable, because it is “mutual,” i.e., it requires whichever party initiates arbitration to pay such fees, and allows recoupment only if the party prevails. In that regard, United Revenue simply misunderstands *Armendariz*.

In *Armendariz*, the fee clause at issue was also, in the technical sense, mutual. As explained by the Supreme Court, the fees in that agreement were “governed by Code of Civil Procedure section 1284.2, which provides that ‘each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator . . . .’” (*Armendariz, supra*, 24 Cal.4th at p. 107.) The problem with such a provision, though, is that as a practical matter it places an unacceptable financial burden

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<sup>6</sup> In her oral argument before this court, United Revenue’s counsel ignored this inherently unfair venue provision, until specifically asked by the panel to address it. At that point, she simply denied that any such provision had been included in the arbitration agreement. Her ignorance of the issue is surprising and disturbing, since both sides devoted substantial portions of their briefs to it, and counsel herself was the signatory on both briefs filed in behalf of United Revenue.

on an employee at a time when he or she is least able to shoulder it. The enforcement of such an agreement would pose “a significant risk that employees will have to bear large costs to vindicate their statutory right against workplace discrimination, and therefore chills the exercise of that right.” (*Id.* at p. 110.) Thus, the Supreme Court concluded that “that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court.” (*Id.* at pp. 110-111.)

In short, *Armendariz* actually requires that the fee provision in an employer-mandated arbitration agreement be *non-mutual*. An employer which chooses to impose mandatory arbitration on its employees’ rights to assert certain types of claims must be willing to pay for it. Here, United Revenue has made clear it is not. Indeed, even in 2002, when the parties were attempting to negotiate the terms of the purported third arbitration agreement — and *Armendariz* had been law for two years — United Revenue was still only willing to go so far as to *advance* the fees, subject to a right to recoup them from Prall if she failed to prevail in the arbitration.

Finally, the arbitration provision here also expressly states that if arbitration is initiated, the parties will be “significantly limited in the amount of discovery or information they may obtain . . . .” That clause appears to be inconsistent with *Armendariz*, which mandates that the employee must, at a minimum, be “entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s).” (*Armendariz, supra*, 24 Cal.4th at p.106.) United Revenue asserts that the clause presents no problem, because the arbitration here would be subject to the rules of the AAA, which specifically give the arbitrator discretion to order appropriate discovery. However, in a contractual arbitration, the arbitrator’s powers are necessarily limited by the terms of the arbitration agreement (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8), and we think it likely an

arbitrator might conclude his discretion is substantially constrained by a term expressly providing that discovery will be “significantly limited.”

For each of these reasons, we agree with the trial court’s conclusion that the arbitration provision imposed upon Prall in 2000 was unconscionable under the *Armendariz* test.

United Revenue’s fall-back position is that the agreement should be enforced – despite this unconscionability – because the preferred remedy for unconscionability is to merely sever the offending clauses. As explained in *Armendariz*, though, severance is not appropriate where unconscionability permeates the entire agreement. And the existence of multiple defects supports the conclusion that an agreement is permeated with unconscionability, because “multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer’s advantage.” (*Armendariz, supra*, 24 Cal.4th at p. 124.)

In this case, the arbitration provision includes multiple unlawful and disturbing clauses, which anyone would understand to place almost impossible burdens on Prall’s ability to bring a claim, and then make clear that even if she did, she would not be entitled to anything like the breadth of discovery she would be entitled to in court. And while each of the offending clauses in this case could technically be stricken, and a stripped-down version of the provision would be theoretically enforceable, we conclude the trial court did not err in refusing to do so.

Under *Armendariz, supra*, a court can refuse to enforce an arbitration agreement based upon even a single unconscionable term, which might otherwise appear severable, if it concludes the term was drafted in bad faith. As the court explained, “[t]he overarching inquiry is whether ““the interests of justice . . . would be furthered”” by severance. [Citation.]” (*Armendariz, supra*, 24 Cal.4th at p. 124.) It also noted that “[a]n employer will not be deterred from routinely inserting . . . a deliberately illegal

clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter.” (*Id.* at pp. 124-125, fn. 13.)

In determining the bona fides of an arbitration clause, we look to whether the law was “sufficiently clear at the time the arbitration agreement was signed to lead to the conclusion that this . . . clause was drafted in bad faith.” (*Armendariz, supra*, 24 Cal.4th at pp. 124-125, fn. 13.) In this case, the evidence is more than sufficient to indicate bad faith.

First, the venue clause is patently one-sided and unfair. We can discern no reason at all why one party should ever have the option to file suit anywhere it finds convenient (or merely concludes would be inconvenient to its opponent) while its opponent is restricted to filing far away in a *neighboring* state. United Revenue has offered no explanation which might have justified that disparity at the time the provision was imposed upon Prall.<sup>7</sup>

Second, United Revenue’s arbitration fee clause was flatly inconsistent with the recently decided *Armendariz* case at the time it was entered into. And although United Revenue might have claimed ignorance of *Armendariz* at that time, its stubborn refusal to simply pay the forum cost of arbitration, even as late as 2002, was sufficient to support the trial court’s inference that it was unwilling to do what the law required.

The trial court did not err in refusing to compel arbitration in this case. The order is affirmed, and Prall shall recover her costs on appeal.

BEDSWORTH, ACTING P. J.

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<sup>7</sup> United Revenue does explain that Nevada was selected for Prall’s venue because United Revenue Service, Inc., is (or was) incorporated in Nevada. But that hardly explains why only Prall would be bound to litigate in that state.

WE CONCUR:

MOORE, J.

FYBEL, J.